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JAN 02 2002

BEFORE THE  
SURFACE TRANSPORTATION BOARD

THE STB  
4TH FLOOR

OTTER TAIL POWER COMPANY

Complainant,

v.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILWAY COMPANY

Defendant.

Docket No. NOR 42071

**FEE RECEIVED**

JAN 02 2002

SURFACE

**COMPLAINT**

COMES NOW Complainant, Otter Tail Power Company ("Otter Tail"), 215 South Cascade Street, P.O. Box 496, Fergus Falls, MN 56538, and files this Complaint against Defendant, The Burlington Northern and Santa Fe Railway Company ("BNSF"), 2650 Lou Menk Drive, P.O. Box 961057, Fort Worth, TX 76161-0057. Otter Tail brings this Complaint under 49 U.S.C. §§ 10701, 10704, 10707, 11701 and 11704 and pursuant to 49 C.F.R. Part 1111. Otter Tail requests that the Surface Transportation Board ("STB" or "Board") prescribe reasonable rates and service terms for BNSF's transportation of coal in unit trains from mine origins in the Powder River Basin of Wyoming ("PRB") to the location of the Big Stone Generating Station ("Big Stone"), located near Milbank, SD, and to award damages, plus interest, to the extent that Otter Tail will bear and pay common carrier rates in excess of a reasonable maximum for such transportation.

In support of this Complaint, Otter Tail states as follows:

1. Otter Tail is an investor-owned electric company with headquarters in Fergus Falls, MN. It delivers electricity and energy services to more than 126,000 customers in 50,000 square miles of Minnesota, North Dakota, and South Dakota.

2. Otter Tail is a subsidiary of Otter Tail Corporation ("OTC"). In addition to the electric utility operations conducted by Otter Tail, OTC engages in a wide variety of non-utility businesses through its subsidiary Varistar Corporation, including construction, manufacturing, plastics, health services, telecommunications, transportation and entertainment.

3. Big Stone is a coal-fired electric generating facility located along a line of railway owned and operated by BNSF, near Milbank, SD. The present 475-megawatt generating unit at Big Stone is owned by Otter Tail, MDU Resources, Inc., and Northwestern Public Service Company ("Joint Owners"). Otter Tail operates Big Stone as the operating agent on behalf of the Joint Owners. At the present time, the present generating unit consumes approximately 2 million tons of PRB coal each year. Otter Tail relies upon rail transportation for the delivery of this volume of coal from the PRB to the location of the Big Stone plant. Rail transportation is the only practicable means of moving PRB coal in unit train volumes to the Big Stone location. Otter Tail has acquired coal cars and related rail and non-rail equipment to provide for the delivery of coal to the location of the Big Stone plant.

4. BNSF is a common and contract carrier by railroad that engages in the transportation of property in interstate and intrastate commerce. Its headquarters are located in Fort Worth, TX. BNSF is subject to the Interstate Commerce Commission Termination Act of 1995 (49 U.S.C. §§ 10101 *et seq.*) and to the jurisdiction of the Board.

5. BNSF is the only rail carrier that serves the location of the Big Stone plant.

6. BNSF serves the PRB-origin mines that produce coal consumed at Big Stone.

7. Prior to January 1, 2002, BNSF provided coal transportation service to the location of the Big Stone plant under the terms of a confidential rail transportation contract. From time to time, the parties amended the contract, which expired at 11:59 p.m. CST on December 31, 2001.

8. Under the contract, BNSF delivered loaded coal cars to the location of the Big Stone plant in unit trains or trainloads. BNSF also returned empty cars to the mines for reloading.

9. From April 2001 until the present, Otter Tail and BNSF personnel have conducted negotiations for the purpose of establishing a new contract to govern the transportation of coal to the location of the Big Stone plant. The parties have failed to reach an agreement. Accordingly, on January 1, 2002, Otter Tail commenced transportation of PRB coal under the terms of BNSF's Common Carrier Pricing Authority No. BNSF 90062 (attached hereto as Exhibit "A").

10. BNSF's common carrier rates for transportation of coal from PRB mine origins to the location of the Big Stone plant in volumes equal to or greater than 1,800,000 tons per year are (a) \$13.49 per net ton in Otter Tail-supplied aluminum coal railcars with a maximum average lading of 121 tons per car; and (b) \$14.23 per net ton in Otter Tail-supplied steel coal railcars with a maximum average lading of 100 tons per car. *See* Exhibit "A," at 1. BNSF has established secondary rates of \$14.84 per net ton and \$15.65 per net ton for aluminum and steel cars, respectively, in the event that annual volumes are less than 1,800,000 tons. BNSF will apply these secondary rates, retroactively, to all tons shipped in a given year in which the total volume of coal falls short of 1,800,000 tons. *Id.*

11. All of the rates provided by BNSF exceed 180 percent of BNSF's variable cost for the service requested by Otter Tail. Therefore, the Board has jurisdiction over the rates and services pursuant to 49 U.S.C. § 10707 and the Board's rules.

12. BNSF has market dominance over the movement of coal in unit trains from the PRB to the location of the Big Stone plant within the meaning of 49 U.S.C. § 10707 and the Board's rules.

13. BNSF's common carrier rates for the transportation of coal to the location of the Big Stone plant are unreasonable and constitute a violation of 49 U.S.C. §§ 10701(d)(1) and 10702, which require BNSF to establish reasonable rates. The Board should order BNSF to stop the violation and should prescribe a maximum reasonable rate from mines in the Powder River Basin to the location of the Big Stone plant, pursuant to 49 U.S.C. § 10704(a)(1).

14. The Board should award reparations to Otter Tail, as provided under 49 U.S.C. § 11704(b). The reparations should compensate Otter Tail for any and all amounts paid in excess of the reasonable rates prescribed by the Board pursuant to this proceeding, for BNSF's movement of PRB coal to the location of Big Stone, plus interest.

15. Because this case involves the reasonableness of rates for the movement in unit trains of large volumes of coal, the Board should examine the reasonableness of BNSF's rates using the constrained market pricing principles and procedures adopted in *Ex Parte No. 347 (Sub-no. 1), Coal Rate Guidelines - Nationwide*, 1 I.C.C. 2d 520 (1985), as further refined and applied in decisions issued by the Interstate Commerce Commission and the Board.

16. This Complaint also includes any and all adjustments to the challenged rates, and any new rates established by BNSF for the services described herein to the location of the Big Stone Generating Station.

17. This proceeding and the relief requested in this Complaint, if granted, will not constitute a major federal action significantly affecting the quality of the human environment or the conservation of energy resources.

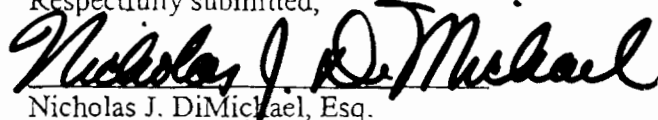
WHEREFORE, Complainant Otter Tail Power Company prays: that the Board require Defendant, The Burlington Northern and Santa Fe Railway Company, to answer the charges alleged herein; that the Board assign this Complaint for hearing under 49 C.F.R. Part 1111; and, that after due hearing and investigation, the Board find that BNSF's common carrier rates applicable to the transportation of coal by rail from PRB mine origins to Otter Tail's Big Stone facility are unreasonable and issue an order that:

(1) prescribes just and reasonable rates and related rules and service terms for the future applicable to the rail transportation of Otter Tail's coal traffic from PRB mine origins to the location of the Big Stone plant pursuant to 49 U.S.C. §§ 10704(a)(1) and 11701(a);

(2) awards Otter Tail reparations, plus any applicable interest, in accordance with 49 U.S.C. § 11704 for unlawful rates set by BNSF from and after January 1, 2002; and

(3) grants such other and further relief to Otter Tail as the Board may deem just and proper under the circumstances.

Respectfully submitted,



Nicholas J. DiMichael, Esq.

Michael H. Higgins, Esq.

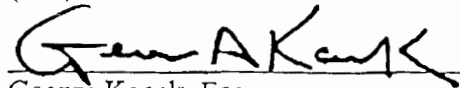
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George Koeck, Esq.

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*Attorneys for Complainant Otter Tail Power  
Company*

January 2, 2002





**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY  
COMMON CARRIER PRICING AUTHORITY BNSF 90062**

Effective Date: On or after January 1, 2002, upon expiration of Contract BN-C-2913.

Expiration Date: One year from the effective date, unless renewed or extended.

Commodity: Raw sub-bituminous Coal, STCC 11-21-Series (excluding artificially dried or processed coal).

Origins: Wyoming Powder River Basin Mines listed in Attachment A, subject to diversion restrictions identified below.

Destination: Big Stone Generating Station located near Big Stone City, SD.

Route: BNSF Direct.

Rate: \$13.49 in U.S. Dollars per net ton of coal in shipper supplied aluminum coal railcars with a maximum average lading per car of 121 tons per car.

\$14.23 in U.S. Dollars per net ton of coal in shipper supplied steel coal railcars with a maximum average lading of 100 tons per car.

Freight charges will be assessed on the basis of the applicable minimum weight per trainload (see below) or the actual weight of coal per trainload whichever is greater. The aforementioned rates are subject to a minimum annual volume of 1,800,000 tons per year. In the event the minimum annual volume is not achieved during any calendar year, adjusted rates of \$14.84 per net ton and \$15.65 per net ton respectively shall be applied to all shipments moving within the calendar year, and shipper will pay the difference between the rates initially paid and the adjusted rates within 30 days following the end of the calendar year in which minimum annual volume requirements were not met.

Trainload and Railcar Weights:

Weights shall be ascertained at origin by shipper, its agent, or the coal mine operator, at no charge to BNSF, and will be provided to BNSF via either electronic data interchange or facsimile upon release of a loaded train. BNSF shall have the right to inspect and certify the origin scales. The minimum weight per trainload is 11,500 net tons of coal for steel cars and 13,685 net tons for aluminum cars.

Railcar Supply and Tender Requirements:

Shipper provided railcars shall be suitable for loading not less than 100 net tons of coal per steel carload. Shipper provided railcars shall be suitable for loading not less than 119 net tons of coal per aluminum carload. The minimum tender for a train of shipper railcars is 115 such railcars and a maximum tender of 117 railcars.

Claims for damage to or destruction of shipper railcars shall be handled in accordance with the procedures set forth in the field manual and office manual of the Association of American Railroads Interchange Rules, as amended from time-to-time. Notwithstanding the foregoing BNSF shall not be liable for loss or damage caused by defects in design, materials, or workmanship of Shipper-supplied equipment or otherwise due events of force Majeure to improper loading or unloading performed by Shipper, its agent, contractor or consignee.



Loading:

Shipper or its agent shall be responsible for the provision of appropriate loading facilities. All cars in each shipment shall be tendered to BNSF (or its agent or contractor) for loaded movement within four (4) hours of actual or constructive placement for loading at origin ("Loading Free Time"). Shipper shall pay a charge per hour or fraction thereof that a train is held in excess of loading free time as published in Tariff BNSF 6041-series.

Unloading:

Shipper or its agent shall be responsible for the provision of appropriate unloading facilities. All cars in each shipment shall be tendered to BNSF (or its agent or contractor) for empty movement within four (4) hours of actual or constructive placement for unloading at destination ("Unloading Free Time"). Shipper shall pay a charge per hour or fraction thereof that a train is held in excess of loading free time as published in Tariff BNSF 6041-series.

Accessorial Services:

Coal unit train accessorial services and charges therefor, other than specified in this common carrier authority, shall be as described in BNSF Authority 6041-Series or successors thereto, except that no change in destination shall be permitted.

Billing and Payment:

BNSF will bill each shipment under the terms of the Uniform Straight Bill of Lading. All railcars for each shipment are to be billed on one (1) Bill of Lading. This Common Carrier Authority BNSF 90062, correct address and patron code must be shown on the bill of lading to insure accurate billing. Freight charges will be billed by BNSF and paid by shipper within fifteen (15) days of receipt of invoice by wire transfer. In the event that shipper does not make timely payment, or if adverse credit conditions occur, which in BNSF's judgement could affect shipper's ability to meet payment terms, BNSF may require shipper to pay cash in advance of service for all amounts for which shipper is liable under this Common Carrier Authority.

Other Provisions:

Shipments made under the provisions of this Common Carrier Authority are subject to the Uniform Freight Classification 6000-Series or its successor, applicable tariffs, statutes, federal regulatory rules and regulations, AAR rules, and other accepted practices within the railroad industry as may be amended from time-to-time.

Shipments shall be deemed to be in service to the Origin served by the immediately preceding shipment; provided, however, diversion to any other qualified Origin as set forth in Attachment A, is authorized without additional charge to Shipper, in the event reasonable notice (by telephone or otherwise) is given to BNSF operating personnel prior to departure of empty trains from Shipper's facility of intention to divert the empty train to a specifically identified alternate Origin.

Attachment A  
(BNSF 90062)

## Wyoming Powder River Basin Coal Origins

<u>Coal Mine</u>	<u>BNSF Origin</u>
Buckskin	Buckskin Jct.
Rawhide	Rawhide Jct.
Eagle Butte	Eagle Jct.
Dry Fork	Dry Fork Jct.
Fort Union	Union Jct.
Clovis Point	East Gillette Jct.
Caballo	Caballo Jct.
Belle Ayr	Belle Ayr Jct.
Caballo Rojo	Rojo Jct.
Cordero	Cordero Jct.
Coal Creek	Coal Creek Jct.
Jacobs Ranch	Jacobs Jct.
Black Thunder	Thunder Jct.

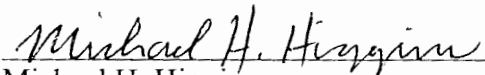
**CERTIFICATE OF SERVICE**

I hereby certify that, on this 2nd day of January 2002, I have served a copy of the foregoing Complaint by express overnight mail, upon the chief legal officer for Defendant at the following address:

Jeffrey R. Moreland, Esq.  
Senior Vice President and General Counsel  
The Burlington Northern and Santa Fe Railway Company  
2650 Lou Menk Drive  
P.O. Box 961057  
Fort Worth, TX 76161-0057

And by Hand Delivery to counsel for Defendant at the following address:

Samuel M. Sipe, Esq.  
Steptoe & Johnson  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20026

  
Michael H. Higgins